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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES EDWIN THOMAS,

Defendant and Appellant.

C063575

(Super. Ct. No. 6286154)

A jury found defendant Charles Edwin Thomas guilty of felony transportation of methamphetamine, felony driving or taking of a vehicle, and misdemeanor possession of a hypodermic needle. After admitting several enhancement allegations, he was sentenced to an aggregate term of nine years.

On appeal, defendant contends Penal Code¹ section 654 bars punishment for the transportation offense because it and the driving offense constituted a single physical act. Defendant also argues both offenses were committed in furtherance of a

¹ All undesignated section references are to the Penal Code.

single objective, and the stolen vehicle was the "means" of transporting the drugs. We disagree and affirm the judgment.

FACTS

Delbert Lane, Jr., awoke the morning of December 5, 2008, to find his white 1997 Ford Ranger pickup truck missing. Lane briefly searched for the truck before calling the Rancho Cordova Police Department to report it stolen. Three days later, he received a phone message that his truck was in a tow lot in Truckee. After recovering his truck, he found the ignition had been "torn out" such that he had to "jimmy" the mechanism to start the engine. Prior to the theft, there was nothing wrong with the truck's ignition system. Lane had not given anyone permission to use the vehicle that day and did not know defendant.

At approximately 10:15 p.m. on December 5, 2008, California Highway Patrol Officer Todd Kettwig stopped a white 1997 Ford Ranger pickup truck for speeding on westbound Interstate 80 near Emigrant Gap. During the enforcement stop, the driver braked so suddenly the truck almost slid off the road. After the truck pulled over, Officer Kettwig used his vehicle's public address system to command the driver to turn the vehicle off and place his hands on the dash. Instead, the driver, defendant, left the truck and walked back toward the patrol vehicle. Officer Kettwig stopped defendant, patted him down for weapons, and told him the reason for the stop. Defendant produced his driver's license, which was expired.

Officer Kettwig ran a DMV records check on defendant's driver's license and the truck's license plate. Records indicated defendant's license was suspended, the truck had been reported stolen out of the Sacramento area that morning, and the owner of the truck was Lane. Officer Kettwig arrested defendant without incident. Defendant explained he obtained the truck from someone named Richard, and they used the truck to move furniture from Sacramento to Reno that day. However, defendant was unable to provide Richard's last name, address, or phone number.

Officer Kettwig asked defendant if there was any contraband in the vehicle, and defendant said there was a case containing "crank," or methamphetamine, in the rear passenger area. Officer Kettwig searched the truck and found a case containing a hypodermic needle, a spoon, and a small amount of methamphetamine.

According to defendant's testimony at trial, he had been hired by a friend of a friend named Andrea to help her boyfriend, Richard. Defendant met Richard at a storage facility in Rancho Cordova on December 4, 2008, and helped him load items into Richard's Chevy S-10 pickup truck for transport to Reno. Before leaving for Reno, they drove to defendant's house in Rio Linda because the Chevy was having mechanical problems. Defendant attempted to repair the truck at his house, but could not.

Early on the morning of December 5, 2008, Richard returned to defendant's house with his son and a different truck, a white

Ford Ranger. Richard and his son transferred the items from the Chevy to the Ford, and all three drove to Reno in the Ford. Defendant sat in the front passenger seat while Richard drove. During the drive, defendant noticed the ignition system in the truck seemed to be "out a little bit." In Reno defendant and Richard unloaded the items from the truck and moved them into an apartment.

Once the move was complete, defendant expected to be paid \$200; however, Richard did not have the money. Defendant had relied upon the promise of money and intended to purchase a bus ticket back to Sacramento. Richard told him to take the truck back to Sacramento and offered him methamphetamine as partial payment. Defendant took the drugs and left for Sacramento in the truck.

DISCUSSION

Defendant contends the bar to multiple punishment established by section 654 required the trial court to stay the sentence he received for transportation of methamphetamine. He argues "the transportation of the [methamphetamine] was incidental to driving the [stolen] vehicle, and part of an indivisible course of conduct." Defendant further argues there is no substantial evidence to support the "implied finding of the trial court that [defendant] entertained different criminal objectives" during the commission of the offenses. We disagree.

Section 654, subdivision (a) provides in relevant part that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the

provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Though the literal language of the statute seems unambiguous, it is subject to years of judicial interpretation that has caused much confusion. In part, such confusion is unavoidable. "Because of the many differing circumstances wherein criminal conduct involving multiple violations may be deemed to arise out of an 'act or omission,' there can be no universal construction which directs the proper application of section 654 in every instance." (*People v. Beamon* (1973) 8 Cal.3d 625, 636.)

I

The Neal Test And Subsequent Limitations

The most significant development in section 654 jurisprudence was our Supreme Court's interpretation of key statutory language in *Neal v. State of California* (1960) 55 Cal.2d 11. In *Neal*, the defendant tried to murder two people by setting fire to their bedroom; he was convicted of and sentenced for two counts of attempted murder and one count of arson. (*Id.* at p. 15.) The issue on appeal was whether section 654 precluded punishment for both attempted murder and arson.

The court noted "[f]ew if any crimes . . . are the result of a single physical act. 'Section 654 has been applied not only where there was but one "act" in the ordinary sense . . . but also where a course of conduct violated more than one statute'" (*Neal v. State of California, supra*, 55 Cal.2d at p. 19, citing *People v. Brown* (1958) 49 Cal.2d 577,

591.) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal*, at p. 19, italics added.) The court applied this "intent and objective" test and determined "the arson was merely incidental to the primary objective of killing [the victims]." (*Id.* at p. 20.) The defendant could not be sentenced for arson, the less serious offense. (*Ibid.*)

The "intent and objective" test established in *Neal* was criticized from the beginning. (See *Neal v. State of California*, *supra*, 55 Cal.2d at pp. 25-26 (dis. opn. of Schauer, J.)) Clearly, the *Neal* interpretation of "act or omission" to include "a course of criminal conduct" enlarges the literal language of section 654. (*People v. Beamon*, *supra*, 8 Cal.3d at p. 638.) Moreover, in some situations the *Neal* test defeats the purpose of section 654, which is to provide punishment commensurate with criminal liability. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211.) In a subsequent attack on *Neal*, the court indicated that, if faced with the issue for the first time, it might "adopt a rule that is truer to the language of section 654 and its purpose . . . rather than the rule of *Neal*." (*Latimer*, at p. 1212.) The *Latimer* court declined to overrule *Neal* because of legislative reliance on the rule, but stated its decision "must not be construed as an endorsement of its wisdom." (*Latimer*, at p. 1216.)

Perhaps unsurprisingly, many subsequent decisions have limited the scope of the *Neal* test. "Some have narrowly interpreted the length of time the defendant had a specific objective, and thereby found similar but *consecutive* objectives permitting multiple punishments. [Citations.] [¶] Other cases have found separate, although sometimes simultaneous, objectives under the facts. [Citations.] Additionally, even *Neal* itself made clear that crimes of violence against multiple victims were separately punishable. [Citation.] [¶] These examples, which are not exhaustive, have helped mitigate the concerns regarding the *Neal* test in specific situations, but have not eliminated them entirely." (*People v. Latimer, supra*, 5 Cal.4th at pp. 1211-1212.)

Of particular importance is our Supreme Court's clarification of the *Neal* test in *In re Hayes* (1969) 70 Cal.2d 604. The defendant in *Hayes* pled guilty to driving while intoxicated and driving with a suspended license and was sentenced for both offenses. (*Id.* at p. 605.) On appeal, he argued section 654 precluded multiple sentences because both offenses arose from the single physical act of driving. (*In re Hayes*, at p. 606.) The court rejected this argument because, in the abstract, driving is a "neutral act" not "'made punishable' by any statute." (*Id.* at pp. 606-607.) The proper approach was to "isolate the various *criminal* acts involved, and then to examine only those acts for identity." (*Id.* at p. 607.) Though it offered little guidance as to the meaning of "criminal act," the court ruled driving with a suspended license and driving

while intoxicated were separate criminal acts that are "in no sense identical or equivalent." (*Ibid.*) The court affirmed the imposition of both sentences. (*Id.* at p. 605.)

II

Standard Of Review

The question of whether the defendant entertained multiple criminal objectives such that section 654 precludes multiple punishment is one of fact for the trial court, and its findings on this question will be upheld on appeal if there is any substantial evidence to support them. (*People v. Akins* (1997) 56 Cal.App.4th 331, 339, citing *People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136.) We review the trial court's findings "'in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence.'" (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085, quoting *People v. Holly* (1976) 62 Cal.App.3d 797, 803.)

III

Defendant's Characterizations Of The Offenses

Are Improper In Light Of Hayes

Defendant first argues section 654 precludes multiple punishment because both offenses were the result of a single physical act: driving the truck. Defendant apparently relies on the plain meaning of "act" without consideration of the decisions discussed previously. Applying those decisions here, it is quickly apparent that defendant urges us to do precisely what our Supreme Court expressly rejected in *Hayes*. It is

improper to describe defendant's behavior as the single physical act of "driving" because, without more, driving is not a punishable act. (*In re Hayes, supra*, 70 Cal.2d at pp. 606-607.) Rather, the driving and transportation offenses constitute distinct criminal acts. (See *id.* at p. 607.) By one act, defendant unlawfully drove a car he knew he was not authorized to drive; by the second act, he unlawfully transported methamphetamine. Under *Hayes*, it does not matter that both of these criminal acts shared the same noncriminal act of driving.

Defendant's second argument is that both offenses were committed in furtherance of a single objective: transporting himself and his possessions. Even assuming this constitutes a single objective, it fails under *Hayes* for the same reasons as his first argument. For the purposes of the *Neal* test, defendant cannot be characterized as pursuing the single objective of transportation because that alone is not a *criminal* intent or objective. (See *In re Hayes, supra*, 70 Cal.2d at p. 609.) Again, it is clear the two offenses had independent criminal objectives: (1) knowingly transporting a usable amount of methamphetamine; and (2) driving another person's vehicle without the owner's consent and with the intent to deprive the owner of possession for any period of time. While perhaps related to one another, these objectives are not identical.

IV

*Substantial Evidence Supports The Trial Court's
Implied Finding That Neither Offense Was Strictly
A Means To The Accomplishment Of The Other*

Because the two offenses here are not based on identical criminal acts, the *Neal* test applies only if one offense was committed strictly as a means to the other. (*In re Hayes*, *supra*, 70 Cal.2d at pp. 609-610.) Defendant alludes to this point when he claims "[t]he means by which he transported the methamphetamine was the stolen vehicle."² However, defendant misapprehends the use of the term "means" in *Hayes*. In *Hayes*, our Supreme Court used the term when discussing *Neal*, noting that "the defendant had attempted murder by means of arson We viewed that circumstance as an indivisible 'course of criminal conduct,' the criminal act of arson being only the means toward an ultimate criminal objective of murder. We stated that where there was only a single 'intent and objective' involved in such a course of criminal conduct, section 654 precluded multiple punishment." (*In re Hayes*, *supra*, 70 Cal.2d at p. 609.) The *Hayes* court then explained "[h]ere neither of the two violations [driving while intoxicated and driving with a suspended license] can realistically be

² Both parties spend considerable time making forced analogies to factually dissimilar cases. The complex and often confusing nature of section 654 renders such efforts nigh useless. Instead, the analysis should focus on the tests as originally articulated by our Supreme Court.

viewed as a 'means' toward the other and as such a part of a single course of criminal conduct, in the sense that the arson in *Neal* was committed not to burn property but only as a means toward the single objective of murder." (*Id.* at pp. 609-610.)

The same is true here. Though defendant happened to transport the methamphetamine by driving the stolen truck, the driving offense was not simply the "means" to commit the transportation offense as described in *Neal*; the driving of the stolen truck was not merely incidental to a primary objective of transporting the methamphetamine. The record shows defendant had ample motivation to drive the truck that was unrelated to transporting the drugs.

First, defendant testified that when Richard told him to drive the truck back to Sacramento he checked the vehicle's fluids, then "got in the truck and adjusted the mirrors and the seat" It was only after he took these preparatory actions that Richard offered him the drugs as partial payment. Second, defendant planned to use the \$200 he was to be paid for his services to purchase a bus ticket back to Sacramento, but was unable to do so because Richard did not have the money. Thus, the truck provided the means for him to return to Sacramento, regardless of whether he had the methamphetamine with him. Finally, defendant assumed he and Richard would finish moving the rest of the items out of the storage facility at a later time. Therefore, the truck had continuing utility to defendant as a part of this moving operation.

Under these circumstances, the trial court could reasonably infer defendant did not commit the driving offense strictly in pursuit of the transportation offense and thus had separate criminal intents.³

Accordingly, multiple sentencing was appropriate.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.

³ In the final paragraph of his brief, defendant raises a Fourteenth Amendment due process clause challenge to the sentences. Because multiple sentences were proper under section 654, the trial court did not act in excess of its jurisdiction and did not deprive defendant of a recognized liberty interest.